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No. 80-343

IN THE

Supreme Court of the United States

October Term, 1980

GILBERT LEWIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A. Where a conflict of interest may exist because of an attorney's former representation in civil matters of a now immunized witness, does an accused have the right to knowingly and intelligently waive his Sixth Amendment right to the effective assistance of counsel, free of conflicts, and insist upon that attorney as his counsel in a criminal trial.

B. Where an accused's attorney may be in posession of certain communications received by that attorney from a former client, now an immunized government witness, which communications are not regarded as confidential by the highest court of the state in which the transactions occurred, may a federal district court bar that attorney from representing the accused on the basis of the attorney's receipt of those communications.

C. Does an accused's Sixth Amendment right to the assistance of counsel for his defense supersede the rights of a former client of the accused's attorney not to have possible prior confidential communications disclosed at the accused's criminal trial.

II. LIST OF PARTIES

United States of America (Respondent)
Gilbert A. Lewin (Petitioner-Defendant)
Edwin Siegner (Defendant)
Paul Catinella (Defendant)

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The opinion and Order of the United States District Court for the Eastern District of Pennsylvania and the Judgment Order of the Court of Appeals for the Third Circuit have, to the best of Petitioner's knowledge, not been published in a national reporter. (Appendix "A" & "B")

VI. JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the Order of the United States District Court for the Eastern District of Pennsylvania dated May 20, 1980, was entered on July 9, 1980, and both the District Court's Opinion and Order and the Third Circuit's Judgment Order is printed, *infra* (Appendix "A" & "B"). The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing was entered on August 4, 1980, and is printed, *infra* (Appendix "C"). The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1) and the All Writs Statute, 28 U. S. C. § 1651.

VII. CONSTITUTIONAL PROVISIONS INVOLVED AND OTHER LAWS INVOLVED HEREIN

United States Constitution:

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Code of Professional Responsibility:

Relevant sections are printed, *infra* (Appendix "D", pp. A16-A19).

VIII. STATEMENT OF THE CASE

This is a petition for Writ of Certiorari to the Third Circuit Court of Appeals following that Court's affirming the Order of the Honorable Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania, entered on May 20, 1980, granting the Government's Motion to Disqualify Gilbert B. Abramson, Esquire, from representing Petitioner-co-defendant, Gilbert A. Lewin. The issue involving disqualification originally came on to be heard as a Grand Jury matter (E. D. Pa. Misc. No. 78-276), before the Honorable Daniel H. Huyett, III, on March 11, 1980, following the joinder of the issue by the Government's Motion to Disqualify, and the respondent's Answer thereto. While the matter was before Judge Huyett under advisement, on April 22, 1980, indictments were brought down as of Criminal No. 80-147-3, United States District Court for the Eastern District of Pennsylvania against Edwin Siegner, Paul Catinella and petitioner herein, Gilbert A. Lewin, charging each with conspiracy (18 USC § 371) and substantive counts of false statements to banks (18 USC § 1014), misapplication of funds by bank officers (18 USC § 656), and receipt of gifts for processing loans (18 USC § 215), the latter charge applying to Siegner and Catinella in their capacities as officers of the Frankford Trust Company.

Jurisdiction of the District Court was based upon 18 USC § 3231.

The factual background of the case and relationship of the parties, insofar as pertinent, are as follows:

Lewin was an officer and fifty (50%) percent shareholder of the Spiewak-Lewin Construction Company (hereinafter referred to as Spiewak-Lewin), a Pennsylvania corporation engaged in home building. The other fifty (50%) percent shareholder of Spiewak-Lewin was a certain Joseph Spiewak, an unindicted, immunized co-conspirator.

Lewin and Spiewak, along with one Edward Gordon, also an immunized co-conspirator, owned thirty-three and one-third (33⅓%) percent of the shares of Pine Valley Estates, a Pennsylvania corporation which was the owner and developer of certain land upon which new homes were to be built known as "Pine Valley Estates." Those portions of the indictment involving Spiewak-Lewin concern a development known as "Centennial Square Homes." The balance of the indictment involves transactions concerning "Pine Valley Estates."

Essentially, the indictment charges that Lewin ,while an officer of Spiewak-Lewin and Pine Valley Estates, conspired and did submit false information to Frankford Trust Company to cause Frankford Trust to approve loans, lend money, and issue payments to these corporations.

In approximately June of 1973, the law firm of Eilberg, Corson, Getson and Abramson commenced representation of Spiewak-Lewin. In 1976, that same firm formed and commenced representation of Pine Valley Estates. Abramson was a member of that firm during those years, until his withdrawal from the firm in June of 1977. Although Abramson's former law firm was general counsel to these corporate entities, Abramson's contact with Spiewak-Lewin involved exclusively litigation matters. During the course of Mr. Abramson's representation of Spiewak-Lewin, substantially all of his contact was with Mr. Lewin. Abramson's partner, Getson, was in charge of handling the corporate aspects of representation for Spiewak-Lewin and Pine Valley Estates. Abramson had several discussions with Spiewak concerning litigation matters before his departure from his former firm. None of these discussions with Spiewak pertained to the matters which are the subject of this indictment. Abramson never represented Lewin, Spiewak or Gordon in any matter relating to Pine Valley Estates and never represented either Spiewak or Gordon in any personal capacity.

In the hearing before Judge Huyett, Abramson testified at length concerning the Government's other allegations of conflict of interest. Abramson testified he knew of no reason which would prevent him from effectively cross examining any of the Government's potential witnesses, including Spiewak and Gordon. Most significantly, Lewin, present throughout the entire proceedings before Judge Huyett was apprised of all of the ramifications of Abramson's representation of him, and Lewin was persistent in his desire to have Abramson continue to represent him.

The alleged grounds for Abramson's disqualification asserted by the government were: (1) that prior confidential communications between Abramson and Spiewak and/or Gordon might be jeopardized; (2) that Abramson might have personal knowledge of facts pertinent to the case and might be a witness; and (3) that Abramson's alleged animosity toward Allan Getson, his former law partner, resulting from a division of fees disagreement, might interfere with his ability to be effective trial counsel. The district court adopted the positions set forth by the government in its motion to disqualify (Appendix "A", pp. A1-A12).

While petitioner challenges the sufficiency of the record to support any of these findings, we do not raise the sufficiency question in this petition, except insofar as the record fails to support the existence of confidential communication as that term is defined by State law. The absence of an adequate record to support the disqualification of Abramson, however, is made evident in the trial court's opinion and findings on each of the bases for disqualification: With respect to prior confidential communication, the district court said: ". . . *[I]t seems at least possible* that such a conflict will become more apparent as this case moves forward . . ." (emphasis added) (Appendix "A", p. A6); With respect to Abramson's alleged personal

knowledge of personal facts: ". . . While *it is not clear* to us whether or not Abramson actually has such knowledge, the government believes that he does . . ." (emphasis added) (Appendix "A", p. A8); With respect to Abramson's alleged animosity toward Getson: ". . . *We can not be certain* that Abramson's personal interest in the Eilberg firm division of fees suit . . . will affect his representation of Lewin." (emphasis added) (Appendix "A", p. A9). Thus, on all three points, the Court spoke in the subjunctive mood and rendered its decision disqualifying Abramson from representing Lewin on the basis of appearances and possibilities only.

Following a timely appeal to the Third Circuit from the District Court's order of disqualification, the Third Circuit Court of Appeals, on July 9, 1980, entered a judgment order (Appendix "B", pp. A13-A14), without opinion, affirming the decision of the District Court. A petition for rehearing was timely filed with the Third Circuit Court of Appeals and that petition for rehearing was denied on August 4, 1980 (Appendix "C", p. A15). It is from the order of the Third Circuit Court of Appeals of July 9, 1980, affirming the District Court's order of disqualification of counsel to which this petition is addressed.

IX. ARGUMENT

A. The Disqualification of the Accused's Attorney by the District Court, and Affirmed by the Third Circuit Court of Appeals, Conflicts With Decisions in the Second, Fourth and Fifth Circuit Courts of Appeals, as Well as Prior Decisions of This Court, and Is in Derogation of the Sixth Amendment's Grant, to the Accused, of a Personal Right to Make a Defense, Allowing a Criminal Defendant to Waive the Effective Assistance of an Attorney Free of Conflicts and to Retaining the Counsel of His Choice.

In affirming the decision of the District Court in this case, the United States Court of Appeals for the Third Circuit has specifically found that a defendant in a criminal trial does not have the absolute right to knowingly and intelligently waive his Sixth Amendment right to the effective assistance of counsel, free of conflict of interest. The Third Circuit Court of Appeals has previously so ruled in *U. S. v. Provenzano, et al,* — F. 2d — (Opin. filed 5/8/80; Appeal #79-1912). In *U. S. v. Dolan,* 570 F. 2d 1177, 1183 (3rd Cir. 1978), the Third Circuit Court of Appeals similarly found that there was no absolute right to particular counsel where there is an actual conflict of interest despite the defendant's willingness to knowingly and intelligently waive that conflict.

The Second, Fourth and Fifth Circuit Courts of Appeals have rendered decisions diametrically opposed to this view maintained by the Third Circuit Court of Appeals, and we suggest that the Third Circuit's view is contrary to the precepts of the Sixth Amendment and the teachings of the decision of this Court.

This Court has long recognized the right of defendants in criminal cases to knowingly and intelligently waive guarantees afforded them under our Constitution. *Johnson*

v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019 (1938); *Glasser v. U. S.*, 315 U. S. 60, 70-71 (1942). In *Faretta v. California*, 422 U. S. 806, 95 S. Ct. 2525 (1975), this Court declared an accused's right to waive his right to the assistance of counsel granted him by the Sixth Amendment, and to proceed pro se in his criminal defense. At the heart of this decision was this Court's finding that:

> ". . . The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." 422 U. S. at 834-835.

This Court declared in *Faretta, supra*, that a defendant's choice to conduct his own defense must be honored even though it worked to his detriment out of " 'that respect for the individual which is the lifeblood of the law', *Illinois v. Allen*, 397 U. S. 337, 350-351 (Brennan, J., concurring)." 422 U. S. at 834. So, too, we suggest that same respect for the individual must afford him the choice of counsel and the right to knowingly and intelligently waive the assistance of conflict-free counsel.

The Second Circuit Court of Appeals has specifically recognized the right of a defendant to knowingly and intelligently waive his Sixth Amendment right to the assistance of counsel free of conflict. In *U. S. v. Armedo-Sarmiento*, 524 F. 2d 591 (2nd Cir. 1975), the Government moved to disqualify counsel because counsel's law firm had previously represented several individuals whom the Government intended to use as witnesses in other criminal cases. At the evidentiary hearing on the Motion to Disqualify, two of the witnesses refused to waive attorney-client privilege with respect to confidential communications made to members of the attorney's disqualified

law firm.[1] The District Court granted the Government's Motion to Disqualify. The Court of Appeals for the Second Circuit, in reversing and reinstating counsel declared:

> "... Of course, a defense counsel's conflict of interest may impair his effectiveness in assisting his client, or in confronting witnesses on behalf of his client. The client, however, may waive his Sixth Amendment rights to effective assistance of counsel and to confrontation of witnesses, just as he may knowingly and intelligently waive any constitutional right." 524 F. 2d at 592.

In *U. S. v. Mahar,* 550 F. 2d 1005 (5th Cir. 1975), the Fifth Circuit reaffirmed its position originally declared in *U. S. v. Garcia,* 517 F. 2d 272 (5th Cir. 1975) that a defendant in a criminal proceeding has the absolute right to voluntarily, knowingly and intelligently waive his right to the effective assistance of counsel free of conflict of interest. The *Mahar* Court declared:

> "... The underlying constitutional standards are clear. A defendant has a right to be represented by fully independent counsel, free of any conflicts of interest posing a risk to the quality of representation. *See, e.g., Glasser v. U. S.,* 315 U. S. 60, 67-76 (1942). Simultaneously, however, the sixth amendment entitles a defendant to waive that right and insist upon retaining an attorney with otherwise disqualifying conflicts." 550 F. 2d at 1007-1008.

See also, *Gray v. Estelle,* 616 F. 2d 801 (5th Cir. 1980).

In *U. S. v. Duklewski,* 567 F. 2d 255 (4th Cir. 1977), the Fourth Circuit Court of Appeals adopted the reasoning

1. In the case at bar, no evidence was offered that either Speiwak or Gordon objected to Abramson's representation of Lewin or that, in fact, confidential communications existed.

of *Garcia, supra,* and held that a defendant has the right to waive his Sixth Amendment right to conflict-free counsel.

In this age of multiple count and multiple defendant indictments and increasing prosecutions involving white collar crime and the increased use of immunized co-conspirators as witnesses by the Government, there arises, more and more, issues concerning conflict of interest. Therefore, it is imperative that this Court resolve the conflict between the Court of Appeals for the Third Circuit and the Second, Fourth and Fifth Circuit Courts of Appeal with regard to an accused's right to waive his Sixth Amendment right to the effective assistance of an attorney free of conflicts. It is crucial that an accused's rights under the United States Constitution not depend upon in which circuit an indictment is brought. The Sixth Amendment must have uniform interpretation throughout the United States of America and the only way that such uniformity can be accomplished is if this Court resolves the conflict in the circuits with regard to this important issue.

B. The Disqualification of the Accused's Attorney by the District Court and Affirmed by the Third Circuit Court of Appeals Based on the District Court's Finding That the Accused's Attorney May Be in Possession of Certain Communications Received by That Attorney From a Former Client, Now an Immunized Government Witness, Conflicts With the Decisions of the Highest Court of the State in Which the Transactions Occurred Which Hold That Such Communications Are Not Confidential and Would, Therefore, Not Be Grounds for Disqualification of the Accused's Counsel of His Choice.

The District Court's memorandum and order which was affirmed by the Third Circuit Court of Appeals bases its disqualification of attorney, Gilbert B. Abramson to a

significant degree on provisions of the Code of Professional Responsibility particularly those sections dealing with attorney-client communications. However, the District Court's opinion flagrantly ignores and without authority to do so in effect overrules decisions of the Pennsylvania Appellate courts which have succinctly explained the applicability of the Code to fact situations such as the instant one and which have indicated which attorney-client communications are "privileged" under said Code provisions. The District Court's action in ignoring the State cases clearly is in derogation of the principle that state law determines the extent and nature of the attorney-client relationship.

Of course, at the outset, it is important to note that it is petitioner's contention that nowhere in the record is there identified a single confidence which might be jeopardized by Abramson's continued representation of Lewin in this case. In this connection, it must be underscored that Abramson had been engaged in this representation for nearly two years in the preindictment status of the case. During this time, no such fear of betrayed confidences were ever voiced by the Government, Getson, or Spiewak and Gordon, all of whom knew of Abramson's representation of Lewin. At the evidentiary hearing before the Honorable Daniel B. Huyett, 3d, Mr. Abramson unequivocally denied the existence of any such communication which might impair his cross-examination of any Government witness.

Moreover, Abramson detailed the nature of his relationship with Spiewak and Gordon as confined to litigation matters of which Spiewak and Lewin had co-extensive and co-existent knowledge. There was nothing known to Spiewak that was not also known to Lewin, and vice versa. In this context, Abramson never represented the corporate officers/shareholders as individuals. The District Court erroneously makes short shrift of this critical distinction,

and was content to note that the "business affairs of the corporation are not easily separated from those of the two individual shareholders." (Appendix "A", p. A6). This may be true with respect to the affairs of the corporate entity, Spiewak-Lewin, it is utterly insupportable outside of this ambit. The essential point is that the affairs of both Spiewak and Gordon in connection with their corporate activities were such that they had no confidences from each other.

In the face of this common sense assessment of this business relationship between Spiewak and Lewin, and in the face of the absence of a scintilla of evidence in the record below which identifies any area in which confidential communications might be jeopardized, the District Court substituted speculation for analysis on the grounds that the latter was simply too difficult. The Court put it this way: ". . . we are disuaded [sic] from any such attempt not merely by the difficulty of such a task, but by the consequences, discussed more fully below, of any failure to properly identify a conflict of interest or confidential communication." (Appendix "A", p. A6). Undoubtedly, the court below was concerned that the only way to establish the existence of either an actual conflict of interest or an endangered confidential communication would involve the disclosure of the communications themselves. This is simply not the case. The Government could have called Spiewak to contradict the testimony of Abramson respecting the nature of their relationship. In this connection, if Spiewak believed that he had disclosed matters to Abramson unknown to Lewin, he could have said so. At the proceedings below, the Government elected not to produce such testimony. The only fair and appropriate inference from this failure is that if called to testify, Spiewak would not contradict Abramson's assess-

ment of their relationship. At a minimum, a negative inference against Lewin should not be drawn.

Even assuming *arguendo* that there are such communications involved in the instant case, under Pennsylvania law these communications are not privileged from disclosure in a situation such as the instant one. In that regard, the Pennsylvania Courts have insisted on facts supporting prejudicial disclosure of confidences in connection with dismissal of counsel. In *Seifert v. Dumatic Industries, Inc., et al,* 197 A. 2d 454 (Pa. Sup. 1964), the Supreme Court of Pennsylvania faced a situation analogous to the one at bar. In *Seifert,* Seifert and Globe, a Pennsylvania corporation, became fifty per cent shareholders in a new corporation, Dumatic. Certain disputes later arose between Globe and Seifert concerning the proper operation of Dumatic. Ultimately, the law firm representing Dumatic filed, on Seifert's behalf, both a stockholders derivative and a direct action alleging breach of fiduciary duty by Globe (the allegation was to the effect that Globe had disclosed trade secrets of Dumatic to its competitors). Globe filed a petition for removal of Seifert's counsel from the case citing conflict of interest and various violations of the Code of Professional Responsibility. The motion was granted by the trial court as to the derivative action.[2] The Supreme Court reversed and reinstated counsel. The Court acknowledged fifty per cent ownership of Dumatic by the parties and chose to rely on the substance of the issues rather than on the formalisms. The Court stated:

> "We are unable to discover any facts in the record which would indicate that Globe would be prejudiced by counsel for Seifert also having been counsel

2. The trial court's order refusing to dismiss counsel from the direct suit was held to be interlocutory and the appeal was quashed.

> for Dumatic, via confidential communications or otherwise. *Any information made available to Seifert through his attorney's representation of Dumatic was equally available to Globe through its appointees on the board of directors of Dumatic.*" 197 A. 2d 454, at 457 (Emphasis added)

Abramson is in the same position here as was counsel in *Seifert, supra.* The parties are likewise in the same position with respect to the corporation, Spiewak-Lewin. Each owns fifty per cent of the stock. Each had equal access to information respecting the operation of the firm. Each had equal entitlement to know the substance of the other's discussions with corporate sounsel.

It must be underscored that Spiewak and Gordon have been immunized. The Government has already protected them far beyond the power of the Canons of Ethics so to do. The Pennsylvania Courts have construed the Canons of Ethics to permit the disclosure of confidential communications, which disclosure does not prejudice the former client's rights. In *Cohen v. Jenkintown Cab Co., et al,* 357 A. 2d 689 (Pa. Super. 1976), the Superior Court stated:

> "Thus, in Pennsylvania, privilege does not bar testimony of an attorney which reveals the substance of a confidential communication, where, in context, the client's rights or interests cannot be adversely affected thereby." (citations omitted). 357 A. 2d 689 at 692.

In the context of this case, Spiewak has no substantial rights which might be prejudiced by Abramson's continued representation of Lewin.

Moreover, Abramson did not even begin to represent Lewin in connection with this matter until after he left

the Eilberg firm in June, 1977. Since that time, he has had utterly no contact with Gordon or Spiewak as clients.[3] In short, the District Court and Third Circuit Court of Appeals ordered Abramson's disqualification not because he was in possession of confidential information which might be compromised, but rather because he had represented the corporation, Spiewak-Lewin, in the past, which is contrary to the state decisions discussed *supra*.

It is crucial that this Court review the District Court's and the Third Circuit's decision on this matter in light of the fact that said federal courts' decisions are diametrically opposed to the decisions of the Pennsylvania Supreme Court and the Pennsylvania Superior Court which we suggest should be binding on the federal court with regard to the state issue of attorney-client privileges.

C. The District Court and the Court of Appeals for the Third Circuit Utilized a Standard in Determining Whether to Disqualify Counsel Which Conflicts With the Standard Adopted by the Second, Fourth and Fifth Circuit Court of Appeals in That the District Court and the Third Circuit's Standard Fails to Properly Balance the Accused's Sixth Amendment Grant of a Personal Right to Make a Defense and to Retain Counsel of His Choice With the Rights of a Former Client of the Accused's Attorney Not to Have Possible Prior Confidential Communications Disclosed at the Accused's Criminal Trial.

In affirming the district court's disqualification of Abramson on the ground that Abramson might be required to disclose confidential communications received

3. As the District Court noted, certain old litigation files have been handled by Abramson on behalf of the corporation against third parties.

from Spiewak and Gordon in order to effectively represent Lewin, ample consideration was not given to the defendant's Sixth Amendment's rights. Essentially, the Third Circuit Court of Appeals has granted the right to the district courts to exercise what the Third Circuit calls the district court's "supervising powers" over the attorneys who practice before it. *U. S. v. Provenzano, supra,* slip op. p. 36. See also *U. S. v. Dolan,* 570 F. 2d 1177 (3 Cir. 1978). The Second Circuit Court of Appeals, again in *U. S. v. Armedo-Sarmiento,* 524 F. 2d 591 (2 Cir. 1975), made clear that conflicts which may exist between an attorney's representation of a criminal defendant and his law firm's previous representation of government witnesses can not compel disqualification of counsel. The Second Circuit Court of Appeals stated:

> "We are mindful of the factors on which the Court below based its decision, including in particular the witnesses' interests in preserving the confidentiality of their privileged communications, but the district court did not give sufficient weight to the appellants' rights . . ." 524 F. 2d at 592.

Apparently, the Third Circuit Court of Appeals applies the same standards for disqualification in criminal cases as it does in civil cases. Cf. *Dolan, supra, Provenzano, supra.* The Second Circuit, we suggest, correctly reasoned that although the Courts have a strong responsibility regarding confidential communications, the controlling factor in the determination of disqualification in criminal cases must be the Sixth Amendment grant to an accused of the assistance of counsel. The *Armedo* Court stated:

> "This Circuit has, in civil cases, frequently stressed the responsibility of the district courts and the bar to

> avoid situations in which attorneys' conflicts of interest may endanger the confidentiality of the clients' privileged communications, as well as cast public doubt on the ethics of the legal profession and the integrity of the judicial process (citation omitted). Because these civil cases do not involve the crucial factor of the criminal defendant's Sixth Amendment rights, however, they are not controlling in the present case." 524 F. 2d at 592-593.

And in a similar situation, the Fourth Circuit in *Duklewski, supra,* overturning the district court's disqualification of counsel on the basis of the ethical aspects of a potential conflict of interest stated:

> ". . . Even though we recognize that the judge was probably prompted by a becoming desire to protect counsel from possible future embarrassment, his action did not give proper regard to the defendant's rights . . ." 567 F. 2d at 257.

We suggest that the question of an attorney's continued representation of an accused despite his former law firm's representation of immunized government witnesses presents an important question requiring a balance of the ethical standards by which attorneys must conduct their professional lives and the accused's right to select the counsel of his choice, and, therefore, is a question which this Court should hear and determine. This is especially true in light of the conflict among the circuits with regard to this very important issue.

X. CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that his Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit be granted and that the lower court's Judgment Order be reversed.

Respectfully submitted,

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XI. APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-00147-01
-02
-03

UNITED STATES OF AMERICA

v.

EDWIN SIEGNER
PAUL CATINELLA
GILBERT LEWIN

Memorandum Opinion and Order.

WEINER, *J.* May 20, 1980

Gilbert Lewin has been indicted by the Grand Jury, charging him with conspiracy to secure loans by the use of false statements, making false statements for the purpose of influencing a bank to approve a loan, and aiding and abetting in violation of 18 U. S. C. §§ 371, 1014, and 2.

Presently before the Court is the Government's Motion to Disqualify Gilbert Abramson, Esq., Lewin's attor-

ney in this case.[1] For the reasons set forth below, the motion is granted.

We begin with a brief summary of the facts.[2] Gilbert Abramson (defendant Lewin's attorney) was formerly a partner in the firm of Eilberg, Corson, Getson and Abramson (Eilberg). In 1973 the Spiewak-Lewin Construction Company (Spiewak-Lewin) became a client of the Eilberg firm. The two principals of Spiewak-Lewin were Gilbert Lewin and Joseph Spiewak, each a 50% shareholder. Lewin is a defendant in this case, and Spiewak is an immunized potential government witness. Beginning in 1974, Abramson began to work directly on matters concerning Spiewak-Lewin, representing the company in all litigation, and only in litigation. In 1976 and 1977, Spiewak individually, Lewin individually, and Edward Gordon organized Pine Valley Estates, Inc. (Pine Valley). Gordon also is an immunized potential government witness. The Eilberg firm represented the Pine Valley principals in the organization of the company and related matters.

In June 1977, Abramson gave notice to the Eilberg firm that he was resigning, and actually left the firm in July of 1977. Both Lewin and Spiewak-Lewin transferred legal business to Abramson after his withdrawal from the firm.

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1. The Government's Motion to Disqualify Counsel was originally brought prior to the indictment of Gilbert Lewin, and the matter assigned to Judge Huyett. *In Re Grand Jury Proceedings,* Misc. No. 78-276. Evidentiary hearings were held on February 11 and March 11, 1980. Prior to a determination by Judge Huyett, this indictment was handed down by the Grand Jury, and the case assigned to this Court.

2. These facts are based upon the testimony and evidence produced at the hearings of February 11 and March 11, 1980, before Judge Huyett.

Pine Valley was organized to build homes in Philadelphia, with financing to be provided by the Frankford Trust Company (Frankford). Defendants Edwin Siegner and Paul Catinella are, respectively, vice president and clerk of Frankford.

The indictment charges that the three defendants, along with Spiewak and Gordon, engaged in a conspiracy to obtain loans for Pine Valley by concealing from Frankford that Spiewak-Lewin, and Joseph Spiewak and Gilbert Lewin maintained ownership interests in Pine Valley. As a part of this scheme, Lewin allegedly paid a fee to defendants Siegner and Catinella in order to procure these loans. Lewin and the other defendants are further charged with making false statements for the purpose of influencing a bank to approve a loan, in that they allegedly submitted false vouchers for construction expenses, for which the loan would be used as payment.

In its briefs in support of its motion to disqualify Abramson, and in testimony at the hearing before Judge Huyett, the Government alleges that an attempt was made by Lewin to obtain a false bill for legal services from the Eilberg firm in order to justify a false voucher submitted to the bank. It should be noted that a voucher and bill relating to legal expenses incurred from the Eilberg firm are not specifically mentioned in the indictment.

Subsequent to the departure of Abramson and dissolution of the Eilberg firm, a lawsuit was commenced against Abramson concerning the division of the firm's proceeds, including certain fees allegedly collected by Abramson from Lewin in regard to a lawsuit in which Spiewak-Lewin was a party. One of the former law partners in the Eilberg firm involved in the lawsuit against Abramson is Allan Getson. The Government alleges in its briefs that Getson is a potential prosecution witness against Lewin.

The Government contends that Abramson must be disqualified from further representation of Lewin in this case on the grounds of actual or potential conflict of interest, and advances three arguments in support of its motion. The Government argues first that in the representation of Lewin, Abramson may be forced to reveal the confidential communications of Spiewak and Gordon, his former clients and the two potential government witnesses against Lewin. The Government next advances the argument that Abramson has personal knowledge of some of the facts pertinent to this case, and might reasonably be asked to testify by either side. The Government's third argument is that Abramson has a personal interest in the suit by Getson, his former law partner and a potential witness in this case, as to the division of legal fees from Spiewak-Lewin, and that this personal interest, as well as an alleged personal animosity toward Getson, may influence his ability to render legal advice and services to Lewin.

We are guided in our consideration of professional ethical considerations and attorney conflict of interest by the *Code of Professional Responsibility* (Code).

Canon 4 of the Code provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Ethical Consideration 4-5 ("EC 4-5") under Canon 4 provides as follows:

> EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences

and secrets of one client to another, and no employment should be accepted that might require such disclosure.

Disciplinary Rule 4-101(B) was designed to promote EC 4-5.

DR 4-101 Preservation of Confidences and Secrets of a Client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

There is an inherent conflict in Abramson's prior representation of Spiewak-Lewin, and of Spiewak, and his present representation of Lewin in this criminal case.

In the course of his earlier representation of the company and the individual principals, Abramson was in a position to be privy to many conversations and other information concerning the business affairs of them all. In his testimony at the March 11, 1980 hearing Abramson stated that he had had "hundreds" of conversations with Lewin about the business affairs of Spiewak-Lewin in connection with various litigation matters (Transcript at 77), Abramson further testified that he had also spoken with Spiewak "three or four" times concerning the business affairs of Spiewak-Lewin (Transcript at 73) but that he did not consider these to be confidential communications (Transcript at 74). Abramson stated that Spiewak and

Lewin were shareholders of the Spiewak-Lewin corporation, but that in his opinion, his client was the corporation. He also stated that he did not recollect ever having represented Pine Valley or Gordon although he had once had Gordon as a witness in a case involving Spiewak-Lewin (Transcript at 68).

Despite Abramson's assertions, we cannot accept the characterization of these conversations as non-confidential. Furthermore, we reject Abramson's distinction between the representation of the Spiewak-Lewin corporation and its two individual shareholders, Spiewak and Lewin. We need not engage in a detailed examination of the nature of the attorney-client relationship which exists between an attorney and the shareholders, directors, and officers of a corporation when an attorney represents a corporation. In the situation presented to us here, it is evident that the business affairs of the corporation are not easily separated from those of the two individual shareholders. Moreover, we are disuaded from any such attempt not merely by the difficulty of such a task, but by the consequences, discussed more fully below, of any failure to properly identify a conflict of interest or confidential communication. Although Abramson does not now believe that continued representation of Lewin involves a conflict of interest resulting from his previous representation of Spiewak-Lewin and of Spiewak, and his association with the Eilberg firm while it represented Spiewak, Lewin, Gordon and Pine Valley, it seems at least possible that such a conflict will become more apparent as this case moves forward. Even if not represented directly by Abramson, Gordon and Pine Valley were represented by Abramson's former law firm while Abramson was still associated with the firm. Gordon and Spiewak, as potential witnesses against Lewin, will face cross-examination by Abramson. Effective cross-examination might reasonably be expected to involve the

use of any information and knowledge possessed by Abramson as a result of his prior representation. However, such information, garnered through an attorney-client association, may well prove in fact to be of a confidential nature. Use of such confidences to the disadvantage of the former client or to the advantage of another is clearly unethical under Disciplinary Rule 4-101(B). In furtherance of his professional duty to Lewin, his present client, Abramson would therefore be forced to reveal such confidences as he may be privy to, thereby violating the mandate of the Code of Professional Responsibility as to the protection of the attorney-client relationship with his former client. Under such circumstances, Abramson should be disqualified from further representation of Lewin in this case.

Canon 5 of the Code provides: "A Lawyer Should Exercise Professional Judgment on Behalf of a Client. Under Canon 5, Ethical Consideration 5-9 provides:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Disciplinary Rule 5-101 provides:

Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on or behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Abramson must also be disqualified on the basis of the government's assertion that he has some personal knowledge of matters relevant to the indictment and alleged use of false vouchers by defendant Lewin. While it is not clear to us whether or not Abramson actually has such knowledge, the government believes that he does, so that he is a potential witness against Lewin. In addition, if Abramson has personal knowledge, it is entirely possible that a different defense counsel might wish to call Abramson to testify on Lewin's behalf. Abramson's continued representation of Lewin would preclude any such testimony as a defense witness, possibly to the detriment of his client. Moreover, although Abramson does not believe that he has personal knowledge related to this case, or that he would be called as a government witness, his independent professional judgment may be clouded by his, and his client's, desire that he continue as counsel

here. A different attorney would be in a better position to assess the existence and extent of any personal knowledge which Abramson may have, and whether he would be of any benefit to Lewin as a defense witness. Disqualification will therefore better serve Lewin's interests and the interest of justice by removing any conflict.

Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment On Behalf of a Client." Pursuant to this Canon, Ethical Consideration 5-2 states:

> Interests of a Lawyer That May Affect His Judgment.
>
> A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.

Disciplinary Rule 5-101 provides:

> Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
>
> (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

We cannot be certain that Abramson's personal interest in the Eilberg firm division of fees suit, in which he and Getson are adversaries will affect his representation of Lewin. The likelihood of such a conflict is obvious, however, with regard to the cross-examination of Getson, who the government has indicated is a potential prosecution witness. Abramson's allegedly strong animosity toward Getson with respect to their personal dispute could affect Abramson's independent professional judgment with

regard to the defense of Lewin, particularly since the Eilberg firm suit involves fee payments by Spiewak-Lewin. As was the case with respect to any personal knowledge of Abramson, a different attorney will be able to represent Lewin without any conflict.

We are strengthened in our determination that Abramson be disqualified by our consideration of the dangers presented by the continued representation of Lewin by Abramson even if Spiewak, Gordon and Getson do not testify against Lewin, or Abramson does not cross examine them. Indeed, regardless of whether the case comes to trial, or Spiewak, Gordon or Getson testify, or Abramson cross examines them, or whether Lewin pleads guilty without a trial, any final judgment of guilt would remain forever open to challenge by the defendant on grounds of ineffective assistance of counsel. Whether or not such a claim by the defendant would have any merit at all, the mere existence of that possibility, so likely in a case such as this, fosters a climate of uncertainty unfair to the government, and most importantly, to the defendant. In addition, the effectiveness of, and confidence of the people in the criminal justice system is not enhanced by such doubts. Moreover, sanction of continued representation by attorneys in situations such as this raises the specter of deliberate abuse by defendants and their attorneys, who may seek to avoid disqualification in cases of conflict of interest in the hope of later seeking reversal of a conviction or withdrawal of a guilty plea.[3]

We are not unmindful of Lewin's choice of Abramson as his attorney, and of Abramson's testimony that he has explained to Lewin the possible ramifications of his continued representation of him, and that Lewin nevertheless wants Abramson to represent him. (Transcript at 77-78). We reject any suggestion by Abramson that Lewin has thereby "waived" any con-

3. Of course, we make no intimation whatsoever of any such intent by those involved in this case.

flict of interest in regard to further representation by Abramson. Although such a waiver of effective assistance of counsel may be made by a defendant, it is obvious that Lewin may not make any waiver of a conflict of interest with respect to third parties. Thus, any disclosure by Abramson of any confidential communications of Spiewak or Gordon must be agreed to by Spiewak and Gordon even if Lewin "waives" Abramson's conflict as regards him (Lewin).[4]

This exercise of the court's supervisory powers to disqualify attorney Abramson does not abrogate defendant Lewin's Sixth Amendment rights. The Sixth Amendment guarantees each defendant the "assistance of counsel for his defense." This guarantee "contemplates that such assistance be untrammeled and unimpaired", *Glasser v. United States,* 315 U. S. 60, 70 (1942). Nevertheless, "although the right to counsel is absolute, there is no right to a particular counsel". *United States v. Dolan,* 570 F. 2d 1177, 1181 (3d Cir. 1978). "Certainly the sixth amendment should not be interpreted to allow a defendant to sanction a lawyer's breach of ethical duties, when such duties serve the public interest as well as the client's." *Id.* at 1183. "When a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant". *Id.* at 1184.

We therefore grant the motion of the government to disqualify Abramson.

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4. The standards established for such a waiver and procedures to be followed by the court are set forth in *United States v. Dolan,* 570 F. 2d 1177, 1181 (3d Cir. 1978). No inquiry has been made of the defendant Lewin as to whether the waiver standards have been met here. We need not do so in view of the fact that Lewin may not make a waiver on behalf of Spiewak or Gordon.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-00147-01
02
03

UNITED STATES OF AMERICA

v.

EDWIN SIEGNER
PAUL CATINELLA
GILBERT LEWIN

Order.

The motion of the United States to disqualify Gilbert Abramson, attorney for defendant, Gilbert Lewin, is GRANTED.

Defendant, Gilbert Lewin is to appear with his new counsel for arraignment on Wednesday, May 28, 1980, at 9:15 a.m. in Courtroom 6B, United States Courthouse, 6th and Market Streets, Philadelphia, Pennsylvania.

All other defendants and their counsel are to appear before the Court at that time.

IT IS SO ORDERED.

/s/ CHARLES R. WEINER
Charles R. Weiner

XII. APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1808 and 80-1823

UNITED STATES OF AMERICA

v.

GILBERT LEWIN,
Appellant in No. 80-1808

GILBERT B. ABRAMSON, ESQUIRE,
Appellant in No. 80-1823

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Crim. No. 80-00147-03)

Argued July 7, 1980
Before: WEIS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges.

Mark E. Kogan, Esquire
1616 Walnut Street
Suite 2200
Philadelphia, PA 19103
Attorney for Appellants.

Peter F. Vaira
United States Attorney

Walter S. Batty, Jr.,
Assistant U. S. Attorney

Daniel B. Huyett
Assistant U. S. Attorney

3310 United States
Courthouse
601 Market Street
Philadelphia, PA 19106
Attorneys for Appellee.

Judgment Order.

After considering the contentions raised by appellants, to-wit,

(1) That the district court erred in disqualifying Abramson as counsel on the bases of his former representation of a corporation of which a now immunized government witness was a shareholder, officer and director;

(2) That the district court's conclusion that Abramson is a potential witness in the trial below is entirely unsupported by the record;

(3) That the district court's conclusion that Abramson should be disqualified because of alleged personal animosity toward a former law partner is entirely unsupported by the record,

it is

ADJUDGED AND ORDERED that the order of the district court be and is hereby affirmed.

By THE COURT,

/s/ JOSEPH F. WEIS, JR.
Joseph F. Weis, Jr.
Circuit Judge

Attest:
/s/ THOMAS F. QUINN
Thomas F. Quinn, *Clerk*

DATED: July 9, 1980

XIII. APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1808 & 80-1823
UNITED STATES OF AMERICA

v.

GILBERT LEWIN, and
GILBERT B. ABRAMSON, Esq.

Appellants

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ WEIS
Weis
Judge

Dated: August 4, 1980

XIV. APPENDIX "D"

UNITED STATES CONSTITUTION

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CODE OF PROFESSIONAL RESPONSIBILITY

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client.

* * *

ETHICAL CONSIDERATIONS

* * *

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care

should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

* * *

DISCIPLINARY RULES

DR 4-101 Preservations of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client, including his identity.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

* * *

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or

assuming a position that would tend to make his judgment less protective of the interests of his client.

* * *

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

* * *

DISCIPLINARY RULES

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called

as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.